United Nations

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 944

Case No. 1034: WHEELER

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Ms. Marsha A. Echols;

Whereas, on 4 March 1996, Patricia Margaret Louise Wheeler, a former staff member of the International Maritime Organization (hereinafter referred to as IMO), filed an application against the decision to terminate her fixed-term appointment following the completion of her probationary period, effective 15 May 1995.

Whereas, on 25 July 1997, the Tribunal rendered judgement No. 808 in case No. 914, *Wheeler*. Notwithstanding the finding of the Joint Appeals Board (JAB) to the contrary, the Tribunal concluded that "the Applicant's initiation of the correct appeals process was ... well within the time-limit stipulated in staff rule 111.2 (b)", and that therefore the "appeal [was] not time-barred". In addition, the Tribunal "remand[ed] the application to the JAB for its consideration on the merits".

Whereas, on 6 August 1998, the Applicant filed an application requesting the Tribunal:

"- To order specific performance by the Respondent of the obligation arising from the conclusions of the Joint Appeals Board, dated 30 April 1998, on the Applicant's appeal, filed on 17 November 1995."

Whereas the Respondent filed his answer on 14 April 1999;

Whereas the Applicant submitted additional comments on 18 May 1999;

Whereas the Respondent submitted additional comments on 16 June 1999;

Whereas the Applicant filed written observations on 17 June 1999;

Whereas the facts of the case have been set forth in Judgement No. 808;

On 3 December 1997, the Head, Personnel Policy Unit, Personnel Section, informed the Applicant that "in accordance with the provisions of staff rule 111.2 (e) ... the Joint Appeals Board [had been] established to consider her case ..." The JAB adopted its report on 30 April 1998. Its conclusions read as follows:

"5. *CONCLUSIONS*

5.1 The post as Head, English Translation Section was advertised as P-4/P-5 according to qualifications and experience. The Applicant had reason to believe that she at least would obtain the same grade that she previously had obtained, namely P-4, [step] III. This matter should have been cleared by the Personnel Section before or at the day she started working in the Organization. There was a lack of 'consistency' from the Personnel Section and it was not the Applicant's fault that her contract was not sorted out before she started working.

5.2 The Joint Appeals Board unanimously concludes that, due to the confusion the Applicant was faced with when taking up her position, she should be offered compensation equal to the difference of the salary of P-4, [step] III and P-4, [step] I, for the time she worked for the Organization (16 May 1994 to 13 March 1995).

5.3 On 16 June 1994, the Applicant signed a contract with a probationary period of one year. Before going to Rwanda in March 1995, the Applicant was told

that when the probationary period was over on 15 May 1995, her contract would be terminated.

5.4 The Joint Appeals Board unanimously concludes that the Applicant was given due notice and the termination of her contract with the Organization by 15 May 1995 is valid.

CONCLUDING REMARKS

The Secretary-General may wish to consider the situation in the light of the conclusions outlined in this report."

On 5 June 1998, the Director of the Administrative Division transmitted a copy of the report to the Applicant and informed her, *inter alia*, as follows:

"...

- The Secretary-General accepts the conclusions and recommendation in paragraph 5.3 and 5.4 of the JAB report;

- However, the Secretary-General does not accept the conclusion in paragraph 5.1 as it is inconsistent with the factual statements in paragraph 4 of the JAB report. In view of this, the conclusion in paragraph 5.2 of the report which is based on paragraph 5.1 is also not acceptable to the Secretary-General.

In summary, the Secretary-General accepts conclusions 5.3 and 5.4 and does not accept 5.1 and 5.2.

..."

Whereas the Applicant's principal contention is:

The Respondent should implement the JAB's recommendation that "due to the confusion the Applicant was faced with when taking up her position, she should be offered compensation equal to the difference of the salary of P-4, [step] III and P-4, [step] I, for the time she worked for the Organization (...)" as the award of such compensation is fully justified.

Whereas the Respondent's principal contentions are:

1. The Applicant is not entitled to any compensation for the difference in salary between the P-4, step I and P-4, step III levels as her salary entitlements are strictly limited to the terms of her letter of appointment.

2. The Organization was consistent in maintaining its offer to the Applicant and there was no confusion in the circumstances surrounding her appointment which would entitle her to any compensation.

The Tribunal, having deliberated from 4 to 24 November 1999, now pronounces the following judgement:

I. This dispute requires the Tribunal to decide whether to order the Secretary-General of IMO to implement the unanimous conclusion of the JAB that the Applicant be offered compensation equal to the difference in salary between a P-4, step III level and a P-4, step I level, for the period she worked for IMO (16 May 1994 to 13 March 1995). The decision depends upon whether IMO was obligated to pay the Applicant at the level she had received in 1985 during a ten day assignment with the International Court of Justice (ICJ). Since that time the Applicant has been employed in a series of short term assignments as a translator with various United Nations organizations, including IMO, at random and unrelated salary levels.

The Tribunal finds that IMO had no obligation to employ the Applicant at the P-4, step III level.

However, there remains the question whether there was some procedural irregularity in the delays and contradictory information given the Applicant when she was hired by IMO as Head, English Translation Section, Conference Division. At that time the IMO Office of Personnel was in a period of staff transition.

II. The Applicant claims that, based on her qualifications and experience, she was entitled to employment at a P-4, step III level. The Applicant worked for several United Nations agencies from time to time between 1977 and 1994 and had been contracted by IMO as a translator periodically between 1983 and 1994. There was no clear pattern in her job advancement or payment, although the record indicates she did advance from a P-3 to a P-4 while at ICJ in 1987-1988.

III. The Applicant's IMO Personal History Form, dated 15 February 1994, indicates that from 1984-1985 she was a temporary (short term) translator at ICJ, where she held eight short term contracts during 1984. The form does not indicate the nature of the Applicant's work at ICJ during this time. Nor does it state the salary level. From 1985 until 1988 the Applicant was a Language Officer at ICJ, first at the P-3 and then at the P-4 level. The form does not state the step. This period apparently included the Applicant's two-week, short term employment by ICJ from 1 February to 15 February 1988, at the P-4, step III level. From sometime in 1988 until she applied for the position of Head, English Translation Section, with IMO, the Applicant maintained a legal translation and interpreting service in London. No other employment information is included on the Personal History Form.

IV. However, other aspects of the Applicant's employment history may be pieced together from the uncontroverted statements in her submissions to the Tribunal. For example, in a letter dated 18 May 1999, the Applicant notes her "staff position" at United Nations Headquarters from 1977-1978 and "numerous other temporary appointments in the United Nations system". Her 6 June 1994 letter to the Secretary-General, IMO, states that she had been contracted by IMO periodically since August 1993, "often setting aside my own work in order to do so". In the above 18 May 1999 letter from the Applicant she also said that her "last grade and step *in the system*, that is, prior to joining IMO, was at grade

P-4, step III" (emphasis added). This information is repeated in the Applicant's written observations dated 17 June 1999, in which it is stated that during her 1986-1987, rather than 1988, service at ICJ she was "promoted" to the P-4, step III level. Subsequently, beginning in 1988, she spent six years with her own translation service and on additional short term contracts. In summary, it appears that the Applicant held both short term and staff positions with ICJ and, in the course of the last short term contract in 1988, she received a salary equivalent to the level she seeks.

There is no information in the record to indicate clearly that the Applicant held a P-4, step III level post at ICJ for longer than the two weeks in 1988. Even if the period were longer, e.g., part of the calendar year 1988, there is a considerable gap between 1988 and 1994. Moreover there is a difference between a translator and the Head of a Service.

The above summary is the background for the events at issue in this dispute.

V. In October 1993 and while in London carrying on her own translation service, the Applicant applied for the post of Head, English Translation Section, at IMO, a position that had been advertised as a "P-4/P-5 according to qualifications and experience". She was offered the position at a P-4, step I level. Before signing a letter of appointment or assuming duties, the Applicant informed the Respondent's Personnel Office of her former employment at the P-4, step III level and indicated her belief that she was entitled to be employed at that salary level. No action was taken by the Respondent.

VI. Without resolving this matter in writing - an unfortunate omission by both parties - the Applicant began to work without a letter of appointment. In a 6 June 1994 letter to the Secretary-General, IMO, the Applicant stated that she had agreed orally with the Director, Conference Division, IMO, to begin work on 16 May, which she did. She notes that the Director, Conference Division, urged her to start on that date in spite of the personal inconvenience to her. After working for approximately two weeks with neither a letter of

appointment nor payment for her services, the Applicant went to the Personnel Office. Her visit triggered an attempt to oust her from the Office and a letter from the Secretary-General, IMO, the same day. According to the Secretary-General's letter the Applicant's request for a higher salary was a counter-offer that had been rejected; the original offer had been rescinded.

The subsequent events include the eviction of the Applicant from her office, her threats of a lawsuit and the subsequent compromise arrangement for a two year fixed term appointment at the "P-4 step I" level with a one year probationary period. This second offer of employment contained a new term that instituted a one year probationary period. At the end of the probationary period - 15 May 1995 - the Respondent terminated the Applicant's services. The termination was followed by the Applicant's first appeal to the JAB and the first application to the Tribunal, which resulted in Judgement No. 808.

VII. None of these events, however, affects the first question before the Tribunal, i.e., whether the Respondent was obligated to employ the Applicant at the P-4, step III level. That is the only matter raised by the Applicant in these proceedings. The response involves an examination of the IMO Staff Regulations and Rules and the terms of the letter of appointment signed by the parties. (Cf. Judgement No. 19, Kaplan (1953)).

VIII. The Applicant argues that the Tribunal should order the Secretary-General, IMO, to implement the unanimous recommendation of the JAB to pay her the salary differential between the P-4, step III and the P-4, step I levels for approximately ten months. She cites article 9.1 of the Statute of the Tribunal as authorizing this relief. Article 9.1 reads, in relevant part, that "[i]f the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked." On the other hand the Respondent argues that this matter is primarily a question of contract interpretation, specifically the Applicant's letter of appointment.

The Tribunal may order specific performance of an obligation. Needless to say, then, it first must determine whether the Secretary-General, IMO, had an obligation to employ the Applicant at the P-4, step III level, either under the IMO Staff Regulations and Rules, the letter of appointment or general principles of law. The Tribunal concludes that there was no such obligation and no abuse of discretion by the Secretary-General, IMO.

IX. Staff rule 104.3 (a) of the United Nations Staff Regulations and Rules concerns "Re-employment". It reads in relevant part, a "former *staff member* who is re-employed shall be given a new appointment ... [whose] terms shall be fully applicable without regard to any period of former service, except that such former service *may be* counted for the purpose of determining seniority in grade" (emphasis added). This part of the staff rule was applicable to the Applicant, when she was a United Nations staff member from 1977-1978, as she states in her uncontroverted 16 June 1994 letter.

However, the IMO Staff Regulations and Rules do not contain a corresponding rule. The Respondent, therefore, properly exercised his discretion in 1994, when he chose not to count the short period of the Applicant's 1988 service in a different capacity at the P-4, step III level with ICJ for the purpose of determining her seniority in grade. This choice was reflected in the letter of appointment signed by the Applicant, the terms of which were fully applicable and fixed the arrangement between the parties. The Applicant was offered the opportunity to reflect on the offer but signed the contract immediately.

IMO staff rule 104.1 confirms this approach. It states that: "The letter of appointment granted to every staff member shall contain expressly, or by reference, all the terms and conditions of employment. All *contractual* entitlements of staff members are strictly limited to those contained expressly, or by reference, in their letters of appointment" (emphasis added). The letter of appointment established the Applicant's salary at the P-4, step I level and reflected the exercise of the discretion described in the preceding paragraph. With the

signing of that letter of appointment by the parties, contractually no higher initial salary was possible.

X. There is also no general principle of law that obligates IMO to offer the Applicant a salary level commensurate with the remuneration she received from ICJ. The general principle of administrative law leaves the terms of the offer within the discretion of the Agency.

XI. Having decided the first issue in the Respondent's favor, the Tribunal nevertheless must consider whether there was some procedural irregularity or abuse of discretion, not in the determination of the salary level but in the process of hiring the Applicant. While any procedural irregularity would not have affected the Applicant's salary level or the letter of appointment, the procedure followed might have been unjust and unfair to the Applicant. The JAB recommended that the Applicant be paid an amount of compensation equal to the salary differential between the P-4, step I and III levels because of the "confusion" she faced when taking up her position. It also found a lack of "consistency" within the Personnel Section and that "it was not the Applicant's fault that her contract was not sorted out before she started working."

The submissions by the Applicant, mostly uncontroverted by the Respondent, show that there was poor internal communication within the personnel office. They show inaction by IMO when there should have been decisions about the Applicant's appointment or an indication to her that the original offer was rescinded. Again there is an uncontroverted assertion in the Applicant's 6 June 1994 letter to the Secretary-General, IMO, that an IMO employee in the personnel section told her to "leave the matter [of the grade differential] with them ... it was not necessary for me to provide documentary proof."

Again, there are only uncontroverted assertions from the Applicant about the details of what occurred. According to her, the Respondent, anxious for her to start working

immediately even arranged for her to take a medical examination, at a physician's private office and not on IMO premises. She was asked by an IMO employee to report for work on 16 May, which she did. This was a situation in which IMO should have acted but did not and the Applicant should have waited for a contract but did not. The Tribunal finds that certain actions by both parties were designed to or resulted in gaining an advantage over the other. As a result of the failure to decide or inform, the Applicant occupied an office without a letter of appointment and was evicted from it.

IMO staff regulation 4.1 states that: "Upon appointment each staff member shall receive a letter of appointment in accordance with the provisions of annex 2 to the present Regulations and signed by the Secretary-General or by an official in the name of the Secretary-General."

XII. The delay by the Respondent and the events described in paragraph VI above, did not change the salary level of the offer. An appointment is finalized by the letter of appointment, not by an oral conversation. Annex 2 (b) to the IMO Staff Regulations and Rules indicates the contractual nature of employment. It states: "... In accepting appointment the staff member shall state that he or she has been acquainted with and accepts the conditions laid down in the Staff Regulations and Staff Rules." The Applicant's letter of appointment was signed by her and contained language corresponding to that in Annex 2 (b). The Tribunal recognizes that often new employees begin to work without a letter of appointment, because of bureaucratic delays. This practice cannot alter the express language of staff regulation 4.1, which links appointment and the letter of appointment. Both parties have an interest in making a letter of appointment a precondition to commencing work.

XIII. This leads to the question of "consistency". The Applicant claims that, while the Head of Personnel Section initially reacted positively to the Applicant and another staff

member welcomed her to the Office, on 16 May 1994, the Head of Personnel Section subsequently barred her from the Office, because she did not have a letter of appointment. The Applicant also claims that the Head of Personnel Section told her that "the reason [she] had heard nothing further from his staff about the step of the appointment was that the section was 'in a mess'", that she "was being treated as a re-employed staff member in line with UN staff rule 104.3 and to be patient until his section had time to sort the matter out." The Applicant's contract of employment is the response to these claims.

XIV. The Tribunal finds no basis for ordering the Secretary-General to implement the JAB conclusion. Moreover, while the IMO Personnel Office clearly had poor internal communications and there was a delay in responding to the Applicant's request for the step III, there was no link between these circumstances and any decision taken. The procedure was not manifestly unfair. No right of the Applicant was infringed.

However, the Applicant did suffer some prejudice and the embarrassment of her eviction, because the Respondent failed to follow normal procedures.

XV. The Tribunal notes that this matter, which involves a relatively small sum of money but perhaps a matter of principle for the Applicant, might have been better addressed by alternative dispute resolution than litigation. The services of an ombudsman or conciliator, for example, or even a small claims board, could save Applicants and the United Nations dispute resolution system time and expense. The Tribunal notes the efforts made by the United Nations Development Program in this regard. More importantly, the flexibility of alternative dispute resolution might offer a speedier and more satisfying solution to disputes involving small sums of money. An applicant seeking small amounts of compensation should not have to wait for four and a half years for the resolution of a simple complaint.

XVI. For the foregoing reasons, the Tribunal awards the Applicant compensation of US$ 1,000 and rejects all other claims.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Marsha A. ECHOLS
Member

New York, 24 November 1999

Maritza STRUYVENBERG
Executive Secretary